

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
Criminal Appeal No.410 of 2002

Mujib Ahmed Mushraf Ali Ahmed
lodged at Yervada Central Prison,
Pune.

Appellant

Vs.

The State of Maharashtra

Respondent

Smt. Racheeta Dhuru, Advocate appointed for the
appellant.

Mr.A.S.Shitole, APP for State.

CORAM: B.H.MARLAPALLE, J.

July 17 & 18, 2007.

ORAL JUDGMENT

1. This is an appeal filed under Section 36B of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short "the NDPS Act") read with Section 374 of Cr.P.C. against the order of conviction and sentence passed by the learned Special Judge under the NDPS Act on 23/10/2001 in Special Sessions Case No.283 of 2000.

2. On 10/4/2000 the PSI Jadhav (PW 4) was on duty in the Thane Nagar Police Station in the neighbourhood of the Thane Railway station along with

Shivaji Patil, Police Constable. He received an information that one person of middle age wearing off-white full shirt and holding a polythene plastic bag with the label "Ambika Suiting and Shirting" was likely to arrive outside Thane Railway station near Canan Vadapav and Juice Centre at about 6-30 p.m. for sale of charas. The information was reduced in writing and necessary entry was taken in the station diary. The constable was directed to call the panchas and they were apprised about the information. The panchas and other police personnel were taken to Shri Dilip Shinde, Senior P.I. and superior of PSI Jadhav PW 4. On the report being submitted Shri Shinde directed the PW 4 to do the needful without warrant on account of urgency and, therefore, along with the kit and weighing machine the police party went in a jeep bearing registration no.MH-12-E-8585 to lay a trap near the Canan Vadapav Centre and before the journey started the panchas had taken the search of the police vehicle as well as the driver. The search party went near the Ashok Theatre, left the vehicle and on foot they were waiting opposite the railway station. At about 6.40 p.m. the person with the description given came from Platform no.2 and was standing in front of Canan Vada-pav centre

with a bag in his hand with the description as stated earlier. At about 6-40 p.m. he was intercepted by PSI Jadhav and encircled by other police personnel. The bag in his hand was searched and it was found to contain 890 gms. of charas wrapped inside. The accused had disclosed his name as Mujib Ahmed Mushraf Ali Ahmed, resident of Ulhasnagar. The contraband was seized. A panchanama was drawn to that effect in the presence of the panchas and the search was undertaken by PSI Jadhav, PW 4 when the accused declined to have search in the presence of a Magistrate or Gazetted Officer. The accused was taken in custody and the raiding party with the substance came back to the police station and made the necessary entries in the police diary and report was submitted to Senior P.I. Shri Shinde at about 7.15 p.m. While seizing the contraband two separate samples weighing about 24 gms. each were also taken and separately packed and sealed. On the next day they were sent for chemical analysis through PW 3 - Shri Sayaji Nathu Jadhav Police Constable (Buckle No.239), Thane Crime Branch. CA report was received and confirmed that it was charas. Charge-sheet was filed and the prosecution examined in all four witnesses viz. PW 1 - Shivaji Dagdu Patil, Police

Constable (Buckle No.3577) Thane Crime Branch, PW 2-
 Ramesh Korage Shetty - Panch Witness, PW 3 - Sayaji
 Nathu Jadhav, Police Constable and PSI Jadhav - PW 4.

3. The learned counsel for the accused submitted

that the impugned order of conviction and sentence is unsustainable on account of non-compliance of the mandatory requirements of Sections 42, 50 and 57 of the NDPS Act. She also submitted that the prosecution did not examine any independent witness and PW 2 who was examined as the panch witness was an interested witness inasmuch as he had visited Thane Nagar police station on the date of the incident for his LIC business and even his evidence did not inspire confidence so as to support the prosecution case. It was further submitted that the accused did not know either reading or writing in Marathi and he spoke only Hindi language. He was hardly a literate person and, therefore, the appraisal made to him by PSI Jadhav - PW 4 at Exhibit 9 could not be relied upon.

4. Mr. Shitole, the learned APP on the other hand

supported the order of conviction and sentence and urged that all the statutory requirements were

complied with by the prosecution during the period of pre-search, during search and post-search. PW 2 could not be called an interested witness and though he was an LIC agent, it could not be accepted that he would be an interested witness favouring the police in such a case of trap under the NDPS Act. The learned APP further submitted that the appraisal was properly made and in any case the requirements of Section 50 are stringent when the contraband substance is recovered from the person of the accused and not when it is recovered from a bag he was carrying.

5. PW 1 Shivaji Patil stated that he was attached to the Crime Branch, Thane and was on duty on 10/4/2000 along with Rajendra Jadhav, P.Naik Merve, Yadav and others. As per him PSI Jadhav had received the information that one person of middle age possessing a plastic bag printed thereon as "Ambika Suiting and Shirting" was likely to arrive near Canan Vadapav and Juice Centre, Thane (West)) and he was likely to bring charas. Therefore, PSI Jadhav made the entry in the register and asked him to call two panchas. He brought Suhas Acharya and Ramesh Shetty - PW 2 who were apprised about the information and

called upon to take search of the police personnel. Search was taken and nothing incriminating was found on their person. Thereafter PW 1, PW 3 along with PW 2 - panch witness and other panch went to Shri Dilip Shinde who in turn authorised PSI Jadhav to lay the trap for the raid in view of the urgency in the matter and before this Shri Shinde had taken the search of the panchas and the police personnel during which nothing objectionable was found. The panchas were called upon to take search of the police jeep and the driver and nothing incriminating was found. The weighing machine and kit were kept in the police vehicle bearing registration No.MH-12-E-8585 and the raiding party reached near the Ashok theatre which is near Thane Railway station. The vehicle was parked and the raiding party waited near Canan Vadapav Centre on foot. The raiding party was hiding itself and waiting for the person as informed and at about 6-30 p.m. the accused with the described plastic bag came out of the railway station and was standing in front of the Vadapav Centre on the road. He was accosted at about 6-40 p.m. by the raiding party and at that time PSI Jadhav - PW 4 introduced himself as well as other police personnel and called upon the accused to take search of the police personnel and

panchas which he declined. He was apprised about the raid by PSI Jadhav who had enquired with the accused whether he intended to be searched in the presence of a Gazetted Officer or Magistrate as required under the Act and he was also given such appraisal notice in writing (Exh.9). The accused signed the same and declined the offer and, therefore, he was searched by the PSI.

6. PW 2 is the panch witness and in his examination-in-chief he stated that on 10/4/2000 he was proceeding to his office and was called by PW 1 Shivaji Patil. He was informed that a trap was to be laid on the basis of the information received and he was called to act as a panch by PSI Jadhav. Accordingly he took the search of the police personnel and no objectionable article was recovered from any one of them. He was thereafter taken to the Senior P.I. Shinde who took his search and nothing objectionable was found with him. Thereafter he sat in the police jeep which went near the Ashok theatre and from there the raiding party walked on towards Canan Vadapav Centre at about 6.15 p.m. About the accused emerging from the railway station, this witness supported the evidence of PW 1 and also about

the search carried out by PSI Jadhav. He confirmed that PSI Jadhav gave him the appraisal after introducing himself and other police officers as well as the panch witness. PSI Jadhav then asked the accused whether he was carrying any contraband article in the bag held by him and the accused denied the same. In the course of the appraisal the accused was informed that he had the right to take search of all the police officers and the panch, to which he declined. He was also apprised that he has the right of being searched before the gazetted officer or Magistrate and, therefore, notice under Section 50 of the Act was given to him. The notice at Exhibit 9 was shown to him and he stated that it was signed by him as one of the panchas. As the accused declined to exercise his right of being searched before any other gazetted officer or Magistrate, PSI Jadhav took the search of the accused and took search of the bag which was held by the accused in his hand. The panchanama was drawn and in the said bag three strips in cylinder shape were found and they were seized by PSI Jadhav. The strips had unusual smell and it was suspected that the material wrapped was charas. The material was weighed and found to be 890 gms. The witness further stated that two samples to extent of

24 gms. each were collected by Jadhav - PW 3, sealed separately and panchanama was drawn at Exhibit 8. In his cross-examination he admitted that he was an agent of LIC and he used to go to the Thane Nagar police station. He was called at 5.10 p.m. in the Crime Branch office. He also stated that as a witness he came before the Court for the first time and he did not act as such in any other matter. He was taken to Senior P.I. Shinde at about 5.30 p.m. but he had not informed the witness anything. The accused arrived at about 6.40 p.m. and when he was accosted there were two panchas i.e. he himself and Suhas. PSI Jadhav had identified the accused on the basis of the information he had. He also admitted that he did not know as to who had written the appraisal at Exhibit 9 though his signature was obtained on the same. He denied the suggestion that he was making false statements about the raid or the panchanama and the charas having been found with the accused. PW 4 Rajendra Jadhav confirmed the events as were brought through the depositions of PW 1 and PW 2. He stated that PW 1 Shivaji had brought two panchas viz. Suhas Acharya and Ramesh Shetty (PW 2) and both of them were apprised about the information received and the plan to lay the trap. The report

submitted by him to Senior P.I. Shri Shinde was admitted by him at Exhibit 15 and as there was no time for issuing warrant, Shri Shinde directed him to do the needful. Accordingly entry was taken in the station diary at about 5.55 p.m. (Exh.16). Search of the police vehicle was taken by the panchas and thereafter the raiding party reached near Ashok theatre at about 6.05 p.m. He deputed two police personnel near Canan Vadapav centre in front of Hotel Kohinoor and other members of the raiding party had scattered waiting for the accused to come as per the information. At about 6.40 p.m. one person came from platform no.2 with one plastic bag in his hand and he stood in front of Canan Vadapav centre with the bag in his hand bearing name of Ambika Shirting and Suiting. He was, therefore, intercepted and the PSI showed the accused his identity card and introduced the other police officers and panchas. The accused disclosed his name as Mujid Ahmed resident of Ulhasnagar and stated that originally he is from Vadagav, Post Kesarganj, Dist. Bhalias, U.P. The accused was informed in Hindi about his right to be searched in the presence of a Gazetted Officer or Magistrate but he declined the offer and, therefore, notice under Section 50 of the NDPS Act was given to

him at Exhibit 9 which was in Marathi. He endorsed the same and declined his right. The plastic bag which was in the hand of the accused was searched and during the search three round shaped (cylinder) charas bundles with sticks of charas were found in the same totally weighing 890 gms. Two samples each of 24 gms. were collected on the spot. The sample packets were sealed after affixing the seal bearing signatures of panchas and accused and detailed panchanama was drawn (Exh.8). The muddemal and the accused along with the raiding party went back to the police station and entry was taken in the station diary at 7.10 p.m. at Sr.No.25 (Exh.17). The written report was submitted to the Senior Officer at Exhibit 18. He stated that the contents of the said report were correct. He also stated that two samples collected at the spot were sent for C.A. with covering letter at Exhibit 11 through PW 3. Muddemal was entrusted in the Thane Nagar Police Station with receipt at Exhibit 19 and report was submitted to the DCP, Crime at Exhibit 20. The CA report was received at Exhibit 21 confirming that the sample sent was that of Charas. He had sent wireless message to the native place of the accused regarding his arrest. In the cross-examination he admitted that the report of

the Superior Officer was submitted at about 5.40 p.m. and immediately directions were given to him to proceed without warrant. He also stated in the cross-examination that he was not acquainted with the panchas. He further admitted that the information received was entered in the log book. He also admitted that the raiding spot was within the jurisdiction of Thane Nagar Police Station and there is a distance of 100 to 105 mtrs. between Ashok Cinema and Thane Nagar Police Station. During the personal search of the accused railway ticket was found with him. He further stated that the accused knew Hindi as well as Marathi. He further stated that the endorsement at Exhibit 9 was made by the accused after he was explained in Hindi and Exhibit 9 was in the handwriting of Constable Jagdale and it was under his signature. He further stated that the accused had signed on both the documents i.e. Exhibit 9 and Exhibit 8. He further stated that the spot was a very busy area and there were number of shops as well as check-posts near the said spot.

7. As per Section 42 of the NDPS Act, the information received is required to be reduced in writing that any narcotic drug, or psyhchotropic

substance in respect of which an offence punishable under the NDPS Act has been committed and the officer may undertake search and seizure of such drug or substance and all materials used in the manufacture thereof and detain and search, and if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under the Act. The proviso to Section 42(1) states that if the officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief. As per sub-section (2) of Section 42 where an officer takes down any information in writing under sub-section (1) or records ground for his belief under the proviso thereto, he shall within seventy-two hours send a copy thereof to his immediate official superior. From the evidence of PW 1, PW 2 and PW 4 it is very clear that all the requirements of Section 42 have been duly complied with in the search and seizure operation of the contraband as was recovered from the plastic bag the accused was carrying.

. Section 50 sets out the conditions under which search of a person shall be conducted. It states that the person sought to be searched or proposed to be searched shall be taken without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in Section 42 or to the nearest Magistrate. As per sub-section (5) when an officer duly authorised under section 42 has reason to believe that it is not possible to take the person to be searched to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance, he may, instead of taking such person to the nearest Gazetted Officer or Magistrate, proceed to search the person as provided under section 100 of the Code of Criminal Procedure. As per sub-section (6), after the search is conducted under sub-section (5), the officer shall record the reasons for such belief which necessitated such search and within seventy-two hours send a copy thereof to his immediate official superior. From the depositions of PW 4 it is clear that after the seizure operation was carried out and the contraband was seized and the accused was taken in custody, a

report was made to the DCP of the concerned Zone immediately after reaching at the police station. At this stage it would be useful to refer to the law laid down in the case of Sajan Abraham Vs. State of Kerala [2001 SCC (Cri) 1217] as under:

"(a) In construing any facts to find, whether the prosecution has complied with the mandate of any provision which is mandatory, one has to examine it with a pragmatic approach. The law under the aforesaid Act being stringent to the persons involved in the field of illicit drug traffic and drug abuse, the legislature time and again has made some of its provisions obligatory for the prosecution to comply with, which the courts have interpreted it to be mandatory. This is in order to balance the stringency for an accused by casting an obligation on the prosecution for its strict compliance. The stringency is because of the type of crime involved under it, so that no such person escapes from the clutches of the law. The court however while construing such provisions strictly should not interpret them so literally so as to render their compliance, impossible. However, before drawing such an inference, it should be examined with caution and circumspection. In other words, if in a case, the following of a mandate strictly, results in delay in trapping an accused, which may lead the accused to escape, then the prosecution case should not be thrown out.

(b) Communication orally to the accused of the appraisal under Section 50 of the Act would be a valid compliance as has been held by the Constitution Bench in the case of State of Punjab v. Baldev Singh [(1999) 6 SCC 172]. And

(c) It is true that the communication to the immediate superior has not been made in the form of a report, but we find, which is

also recorded by the High Court, that PW 5 has sent copies of FIR and other documents to his superior officer, which is not in dispute. Ext. P-9 shows that the copies of the FIR along with other records regarding the arrest of the appellant and seizure of the contraband articles were sent by PW 5 to his superior officer immediately after registering the said case. So, all the necessary information to be submitted in a report was sent. This constitutes substantial compliance and mere absence of any such report cannot be said to have prejudiced the accused. This section is not mandatory in nature. When substantial compliance has been made, as in the present case, it would not vitiate the prosecution case. In the present case, we find PW 5 has sent all the relevant material to his superior officer immediately. Thus we do not find any violation of Section 57 of the Act"

8. In the instant case the learned counsel for the appellant referred to the depositions of PW 2 in his cross-examination and more particularly the statement that PI Shinde had not informed him anything and that he did not know who had written the notice under Section 50 of the NDPS Act (Exh. 9) and, therefore, the compliance of Section 50 was not done. It is important to note that the accused was not searched on his person but in fact what was searched was a plastic bag he was holding in his hand and, therefore, the learned APP rightly relied upon the decision in the case of Gurbax Singh Vs. State of Haryana **[2001 SCC (Cri) 426]**. On the point of independent witnesses not being available, it must be

stated that PW 2 though had admitted that he used to visit the police station in connection with his LIC business, he could not be labeled as an interested witness. He clearly stated before the Court that he was appearing before the Court as a witness for the first time and he had not appeared in any other case earlier. He was a chance witness called by PW 1 at the instance of PW 4 and he did not appear to be a professional witness or a witness who is available with the police all the time. His oral testimony does not suffer from any exaggerations or improvements and, therefore, there is no reason to discard him as an independent witness or to label him as an interested witness.

9. On assessment of the oral depositions of all the four witnesses examined by the prosecution I am satisfied that due compliance of the requirements of Section 50 and Section 57 of the Act has been done in the instant case and the prosecution case does not suffer from any doubts. Therefore, the order of conviction deserves to be confirmed.

10. Coming to the issue of sentence, admittedly the contraband weighed at 890 gms. and it is higher

than small quantity but less than a commercial quantity as per the entry at Serial No.23 in the table published by the notification specifying small quantity and commercial quantity. At the same time the accused appears to be the first timer and there was no reason to believe that he was a frequent possessor or seller of such contraband. Though the information was that the accused was to come there to sell the contraband, when he was accosted admittedly he was not found selling the contraband and it was only seized from the plastic bag in his possession. Section 20B of the Act prescribes the sentence of RI for a term which may extend to 10 years and fine which may extend to Rs.1 lakh. In the instant case the learned Special Judge has sentenced the accused to suffer RI for ten years and imposed a fine of Rs.1 lakh in default thereof to suffer six months' R.I. The learned counsel for the accused stated that he being a poor person could not deposit the fine amount till now. He has been in custody right from the date of trap i.e. 10/4/2000. Thus he has already undergone a sentence of more than seven years. At the relevant time his age was 38 years and as of now he is more than 45 years in age. In my considered opinion the order of sentence passed by the Special

Judge deserves to be modified.

11. In the premises, the order of conviction for the offence punishable under Section 20(b)(ii) read with Section 22 of the NDPS Act passed on 23/10/2001 in Special Sessions Case No.283 of 2000 by the learned Special Judge, Thane is hereby confirmed. However, the sentence awarded to the appellant is reduced to R.I. for seven years and to pay a fine of Rs.50,000/- in default to suffer R.I. for six months. The appeal thus stands partly allowed. The accused is in jail from 10/4/2000 and, therefore, he would be entitled for set off.

. The Registry to communicate this order to the concerned jail forthwith and the Superintendent of the said Jail is directed to take appropriate steps for the release of the appellant on completion of the modified sentence.

(B.H.MARL